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Criminal Restitution for Victims of Child Pornography

Outline

- 1) On July 9, 2009, Senior United States District Court Judge Lacey A. Collier in the Northern District of Florida entered the first ever restitution order against a criminal defendant who was not directly involved in producing the child pornography depicting the victim
- 2) **Mandatory Restitution for Sex Crimes section of the Violence Against Women's Act of 1994** [18 U.S.C. 2259] requires **each defendant** to pay victim the "**full amount**" of her losses including any costs incurred for:
 - a) medical services relating to physical, psychiatric, or psychological care;
 - b) **physical and occupational therapy** or rehabilitation;
 - c) necessary **transportation, temporary housing, and child care** expenses;
 - d) **lost income**;
 - e) **attorneys' fees**, as well as other costs incurred; and
 - f) any other losses suffered by the victim as a **proximate result** of the offense.
- 3) **Ashcroft v. Free Speech Coalition** (2002)
 - a) virtual child pornography is legal
 - b) government must identify real victims

- 4) **Crime Victims Rights Act of 2004 (CVRA)** 18 USC § 3771
 - a) new and powerful bundle of rights to victim of any **federal crime**
 - b) right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused
 - c) right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding
 - d) reasonable right to confer with the attorney for the Government in the case
 - e) right to full and timely restitution as provided in law
 - f) right to be treated with fairness and with respect for the victim's dignity and privacy.
 - g) officers and employees of DOJ and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, these rights
 - h) district court shall take up and decide any motion asserting a victim's right forthwith
 - i) if the district court denies the relief sought, the victim may petition the court of appeals for a writ of mandamus
- 5) *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010)
 - a) "Child pornography is a vile, heinous crime. Mention the term to your average American and he responds with immediate disgust and a sense of unease. However, **once it enters the legal system, child pornography undergoes sterilization.** The sterilization goes far beyond properly removing emotion from [criminal] sentencing decisions. Images are described in the most clinical

sense. Victims all too often remain nameless. The only emotions on display are those of defendants, sorry that their actions were discovered by law enforcement.”

6) Dr. Sharon W. Cooper, et. al., *Medical, Legal, & Social Science Aspects of Child Sexual Exploitation* p. 258 (2005)

a) In the context of children . . . there can be no question of consent, and use of the word pornography may effectively allow us to distance ourselves from the material’s true nature. A preferred term is **abuse images** and this term is increasingly gaining acceptance among professionals working in this area. Using the term abuse images accurately describes the process and product of taking indecent and sexualized pictures of children, and its use is, on the whole, to be supported.

7) **Online Image Description by Pedophile Child Molester**

a) “Jane was about 9 years old. She almost always wore a black mask and had brown hair. She was a bit chubby but still sexy. Her father had a clown-mask and there was music from Slipknot, when he filmed her.”

b) “There are several videos of her. It seemed she didn't enjoy what her father was doing to her, especially when he fucked her with a huge red dildo or hammered her head against his cock, when he was mouth-fucking her. In a few scenes she's seen without a mask, what probably led to the bust and arrest of her father, because someone identified her.”

c) “He always talked to her like she was his slave, which is quite uncommon, because most fathers having sex with their daughters try to justify why they're doing this. She starred in about 7-8 clips of which lots of remixes exist.”

i) “Gets Buttfucked By 14 Inch Long Vibrator (6:10)”

(1) "In this clip they are both masked. The clip starts with daddy sitting in an armchair beside the bed. Tara walks in and slap his left leg telling him in an arrogant and challenging way "fucking son of a bitch i want some cock." After asking her if she really wants some cock he offers his cock for blowing so she gets on her knees and starts blowing. One cut later we also see her blowing in close-up till daddy is asking her if she wants it in her ass. She answers two times with yes and gives a third yes when he asks her if she want it in her ass hard and she repeat it herself. After the next cut we see her from the side sitting on the bed doggy with her feed on the edge of the bed. Then daddy sits down on the bed behind her with a big purple vibrator in dildo-style in his hand. He starts to stick the vibrator gently up her ass a little bit but she is whining and fidgeting."

8) **Child Pornography**

- a) a photographic record of a child's sexual abuse
- b) offenders use these images for sexual arousal
- c) offenders often create collections of child pornography that they exchange with one another, not only for their own personal gratification but also to "normalize" and gain support for their illicit behavior
- d) offenders often show child pornography images to children in an effort to lower a child's inhibitions so they will participate in sexual acts and to "educate" them about how to perform sexual acts
- e) images and/or video files are often characterized as a "series"
 - i) a series is a collection of images and/or video files taken over a period of time and typically containing both apparent child pornography as well non-pornographic images of a child or children

- ii) traders and collectors of child pornography images often name a series before they trade it with other offenders
- iii) analysts have encountered one popular series in over 3,227 evidence reviews submitted by law enforcement
 - (1) in conducting these evidence reviews, analysts have viewed over 35,570 images that appear to be associated with the series
 - (2) in 2009 alone, analysts viewed images associated with the series 8,860 times
- f) victims face a lifetime of victimization because the pornography can be distributed indefinitely
- g) feelings of shame and humiliation are some of the worst affective reactions to treat in victims of sexual abuse
- h) these feelings of shame and humiliation are multiplied exponentially for victims of Internet child pornography
- i) anonymity is something we offer victims of sexual crimes with acknowledgment that they deserve this protection of privacy
- j) yet, knowing one's image is out there at all times is an invasion of privacy of the highest degree which makes the victim feel known, revealed and publicly shamed, rather than anonymous
- k) the ongoing awareness that the pictures are out there interferes significantly with the therapeutic resolution of these problems, as she lives in an enduring state of feeling that she can never really escape or get away from abuse
- l) victims also are concerned that images of their abuse may be used to entice or manipulate other children into sexually abusive acts

9) ***New York v. Ferber***, 458 U.S. 747 (1982) Unanimous

- a) “[t]he use of children as subjects of pornographic materials is very harmful to both the children and the society as a whole. It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. . . .”
- b) “pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions.”

10) ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234, 249 (2002)

- a) “as a permanent record of a child’s abuse, the continued circulation [of child pornography] itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child’s reputation and emotional well-being”

11) **Sentencing Decisions**

- a) ***U.S. v. Sherman***, 268 F.3d 539, 547 (7th Cir. 2001)
 - i) held that the children depicted in child pornography suffer a direct and primary emotional harm when another person possesses, receives or distributes the material
 - ii) court reasoned that “[t]he possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their

individual interest in avoiding the disclosure of personal matters”

b) **U.S. v. Knox**, 32 F.3d 733, 750 (3rd Cir. 1994)

i) child pornography is an “affront to the dignity and privacy of the child and an exploitation of the child’s vulnerability”

c) **U.S. v. Andersson**, 803 F.2d 903 (7th Cir. 1986)

i) the harm inflicted on these children is two-fold: the sexual abuse when the film or photograph is initially produced . . . and the harm continues when these photographs and films are distributed

12) “Whatever the complexities, it is quite clear that the production of abusive images of children feeds, sustains, and generates sexual exploitation of children. . . . There are no good and bad offenders with respect to the trade of abuse images of children.” Cooper, *Aspects of Child Sexual Exploitation*

13) **Restitution is Mandatory**

a) The plain language of Section 2259 states that “in addition to any other civil or criminal penalty authorized by law, **the court shall order restitution for any offense under this chapter.**”

b) Chapter 110 outlaws production of child pornography, receipt and distribution of child pornography, and conspiracy or attempt to produce, receive or distribute child pornography. 18 U.S.C. 2255 and 18 U.S.C. 2255A.

c) Chapter 110 also prohibits possession of child pornography and conspiracy or attempt to possess child pornography. 18 U.S.C. 2255 and 18 U.S.C. 2255A.

d) Congress repeats this mandate again in Section 2259 where it unequivocally states: “Order mandatory. The issuance of a

restitution order under this section is mandatory.” 18 U.S.C. 2259(b)(4)(a).

14) **Who is a Victim?**

- a) an individual is entitled to receive mandatory restitution if they are a “victim”
- b) “the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter (110)”
- c) Courts of Appeals have consistently and repeatedly held that the primary victims of child pornography possession, receipt, and distribution, as well as production, are the children depicted in the pornographic materials
 - i) ***United States v. Ketcham***, 80 F.3d 789 (3rd Cir. 1996)
 - (1) “the primary victims that Congress had in mind when it enacted the law were the children depicted in pornographic materials.”
 - ii) ***United States v. Hibbler***, 159 F.3d 233 (6th Cir. 1998)
 - (1) “the child pornographer, quite simply, directly victimizes the children pictured in such materials. . . . It is the children depicted in the child pornography distributed and possessed by defendant who are the primary victims of the crimes of which he was convicted.”
 - iii) ***United States v. Davis***, 204 F.3d 1064 (11th Cir. 1999)
 - (1) “the harm resulting from possession of child pornography occurs when one sustains a market for such pictures. . . . Therefore, it is not necessary for one to derive any benefit from the child pornography or actively solicit the pornography, provided one’s actions play a role in the distribution network.”

- iv) **United States v. Boos**, 127 F.3d 1207 (9th Cir. 1997)
 - (1) “the harm caused by the distribution of child pornography is concentrated. It is visited upon a single individual or discrete group of individuals, namely, the child or children used in the production of the pornographic material.”

- v) **United States v. Norris**, 159 F.3d 926 (5th Cir. 1998)
 - (1) “[u]nfortunately, the victimization of the children involved does not end when the pornographer’s camera is put away.”
 - (2) “[T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”
 - (3) the mere existence of child pornography represents an invasion of the privacy of the child depicted and recipient of child pornography obviously perpetuates the existence of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children
 - (4) the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials
 - (5) there is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other. The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects

vi) ***United States v. Tillmon***, 195 F.3d 640 (11th Cir. 1999)

- (1) the dissemination certainly exacerbates that harm, not only by constituting a continuing invasion of privacy but by providing the very market that led to the creation of the images in the first place
- (2) the children depicted remain the primary victims not only when the pictures are taken or purchased, but also when they are subsequently transported or distributed from one person to another
- (3) the primary identifiable victim of the transportation of child pornography is the minor depicted in the image

vii) ***United States v. Goff***, 501F.3d 250, 259 (3d Cir. 2007)

- (1) “[c]hildren are exploited, molested, and raped for the prurient pleasure of [end users / consumers] and others who support suppliers of child pornography. These small victims may rank as “no one else” in [the defendant’s] mind, but they do indeed exist outside his mind. Their injuries and the taking of their innocence are all too real. There is nothing “casual” or theoretical about the scars they will bear from being abused for [the defendant’s] advantage.”

15) **Who is harmed? What harm?**

- a) Congress has repeatedly and unequivocally declared that individual child victims are harmed by the receipt, distribution or possession of child pornography
- b) Child pornography is an “affront to the dignity and privacy of the child and the invasion of the child’s vulnerability.” Hon. Christopher H. Smith, *Congressional Record*, Extension of Remarks, p. E2494 (10-20-1992)

c) **Child Pornography Prevention Act of 1996**

i) Congressional Findings:

- (1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved;
- (2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;
- (3) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come;
- (4) possession of child pornography is a distinct harm from which child victims need protection
 1. "prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to protect the victims of child pornography."

d) **Adam Walsh Child Protection and Safety Act of 2006**

- i) child pornography are "harmful to the physiological, emotional, and mental health of the children depicted in child pornography . . . Every instance of viewing images of child

pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”

e) **Effective Child Pornography Prosecution Act 2008**

- i) “Child pornography is a permanent record of a child’s abuse and the distribution of child pornography images revictimizes the child each time the image is viewed.”

16) **Privacy Theory of Recovery**

- a) ***Snakenberg v. Hartford Cas. Ins. Co., Inc.***, 383 S.E.2d 2 (S.C.App. 1989)

- i) South Carolina Court of Appeals held that the tort of wrongful intrusion into private affairs consists of the following elements:

- (1) Intrusion. An intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct;
- (2) Into that which is private. The intrusion on the plaintiff must concern those aspects of herself, her home, her family, her personal relationships, and his communications which one normally expects will be free from exposure to the defendant;
- (3) Substantial and unreasonable enough to be legally cognizable. In order to constitute an invasion of privacy, the defendant’s conduct must be of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances;
- (4) Intentional. The defendant’s act or course of conduct must be intentional.

- ii) Damages =

- (1) unwanted exposure resulting from the intrusion

(2) In assessing the damage, the trier of fact may consider the shame, humiliation, and emotional distress suffered by the plaintiff as compensable elements of damage

b) ***Birnbaum v. U.S.***, 436 F.Supp. 967 (E.D.N.Y. 1977)

i) law generally recognizes that where a person suffers an invasion of the right to privacy, awards are appropriate for general damages covering the injury of invasion itself, as well as for the resulting mental distress

c) **Restatement (Second) of Torts**, § 652H

i) one who has established a cause of action for unreasonable invasion of his privacy is entitled to recover damages for:

(1) the harm to his interest in privacy resulting from the invasion;

(2) his mental distress proved to have been suffered if it is of a kind which normally results from such an invasion; and

(3) special damage of which the invasion is a legal cause.

17) **Power / Limits of Court to Award Restitution**

a) ***United States v. Savoie***, 985 F.2d 612 (1st Cir. 1993)

i) the district court has substantial discretion over the entire process leading to a restitution order and in determining the amount of restitution

ii) so long as the basis for reasonable approximation of a victim's loss is at hand, difficulties in achieving exact measurements will not preclude the district court from ordering restitution.

- b) ***United States v. Julian***, 242 F.3d 1245 (10th Cir. 2001)
- i) “We note that Section 2259 and the other two mandatory restitution statutes associated with violence against women and children which were adopted at the same time, *see* 18 U.S.C. §§ 2248 & 2264, **are much broader than § 3663A** [the Mandatory Victims Restitution Act or MVRA]. . . . these three statutes use the terms ‘full amount of the victim’s losses’ for ‘any costs incurred’ for physical, psychiatric, or psychological care, and also include restitution for ‘any other losses suffered by the victim as a proximate result of the offense.’”
 - ii) “in discussing the rationale behind the mandatory restitution statutes, Congress noted the goal of criminal restitution: to ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well being.”
- c) ***United States v. Laney***, 189 F.3d 954 (9th Cir. 1999)
- i) “the language of the relevant statutes shows that Congress intended to allow district courts to include future counseling expenses in the amount of restitution”
 - ii) “Section 2259 is phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse.”
 - iii) “Congress was well aware that children victimized by sexual abuse often do not recover quickly from their injuries.”
 - iv) the amounts that victims will spend on future counseling with **reasonable certainty**, an award of restitution for future counseling expenses will be upheld
- d) ***United States v. Whitedirt***, 216 F.3d 1085 (9th Cir. 2000)
- i) “a court may order mandatory restitution for amounts that victims have not yet spent”

- e) **United States v. McKay**, 242 F.3d 384 (9th Cir. 2000)
 - i) a district court may order restitution for the future counseling of a sexual abuse victim even though the costs of counseling have not yet been incurred and even when the victim is not already in therapy

18) Determining Mandatory Restitution

- a) **United States v. Danser**, 270 F.3d 451 (7th Cir. 2001)
 - i) "In support of an award of this figure, the government, through a licensed actuary, determined that Karen Doe's life should last an additional 75 years. The government then multiplied the present costs of Karen's weekly [therapy] sessions (\$78 per session) by her actuarially determined life expectancy to come up with \$304,200."
 - ii) "in enacting Section 2259, it is clear that Congress intended to provide victims of sexual abuse with expansive relief for the full amount of . . . [their] losses suffered as a result of abuse. Congress chose unambiguously to use unqualified language in prescribing full restitution for victims."
- b) **U.S. v. Estep**, 378 F.Supp.2d 763 n. 4 (E.D.Ky. 2005)
 - i) court has broad discretion in awarding restitution for "any other losses suffered by the victim as a proximate result of the offense"
 - ii) court awarded attorney's fees to the mother of one child victim for divorce proceedings against the perpetrator, rent payments and transportation expenses, in addition to past and future treatment and counseling costs
 - iii) court also awarded attorney's fees and costs for the victims' attorney who filed a civil case on their behalf

- c) **United States v. Doe**, 488 F.3d 1154 (9th Cir. 2007)
 - i) upheld an award of restitution for trauma counseling and psychological care, case review by a social worker, quarterly medical check-ups, vocational training, formal schooling, and a management fee to a social services organization to coordinate services for numerous child victims

- d) **Lost Income**
 - i) The VAWA statute's use of the broad term "lost income" is distinct from other restitution provisions which limit recovery to
 - (1) "lost income . . . incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" 18 U.S.C. 3663A(b)(4), or
 - (2) "lost income . . . related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense" 18 U.S.C. 3663(b)(4)
 - ii) In 18 U.S.C. 3663A(b)(2)(c), which applies to an offense resulting in bodily injury to a victim, Congress provided for reimbursement for "income lost by such victim as a result of such offense."
 - iii) **United States v. Oslund**, 453 F.3d 1048, 1062 (8th Cir. 2006)
 - (1) when an offense causes bodily harm to a victim, restitution must be ordered for medical or psychological treatment, costs of therapy and rehabilitation, and 'income lost by such victim as a result of such offense'
 - iv) **U.S. v. Bedonie**, 317 F. Supp. 2d 1285 (D. Utah 2004)
 - (1) there is no distinction between past and future income as both are lost "as a result of" the offense; in cases involving

crimes of violence courts are required to award restitution for both past and future lost income

v) ***U.S. v. Serawop***, 505 F3d 1112 (10th Cir. 2007)

(1) any victim suffering bodily injury or death necessarily incurs the income lost only after the injury, i.e. in the future, as a consequence of the defendant's violent act

e) **Emotional Damages**

- i) Mandatory Victims Restitution Act of 1996 amended and restructured the statute
- ii) Senate Report 104-179 emphasized that "no change is made to the scope of restitution required under the VAWA provisions, including the availability of emotional damages."

19) **Joint and Several Liability**

- a) in mandating that a victim recover the "full amount" of her losses, Congress also imposed joint and several liability on defendants
- b) ***United States v. Erickson***, 83 Fed.Appx. 997 (10th Cir. 2003)
 - i) defendant argued that his restitution order was illegal because it included losses attributable to other defendants
 - ii) Tenth Circuit disagreed finding that 18 U.S.C. 3664(h), states that "[i]f the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution."
 - iii) Court found that "the severe, collaborative abuse of this child was cumulative in effect and could not be apportioned to individual perpetrators of crimes against her."

- iv) Court agreed with the district court that “it is no defense for this defendant to say there were other partners; that there were other people who are complicit.”
- c) “if the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution.” 18 U.S.C. 3664(h)
- d) **Restatement Third of Torts**
 - i) consequences to a conclusion that a tortfeasor is **jointly and severally liable**:
 - (1) injured plaintiff may sue any one or combination of tortfeasors who are jointly and severally liable for the plaintiff’s injury. Thus, a plaintiff need only show that a tortfeasor was a legal cause of the injury, not that the tortfeasor was the sole legal cause; the burden of identifying and suing other persons who may be jointly and severally liable is borne by the defendant
 - (2) plaintiff may recover all damages from any jointly and severally liable defendant. Thus, the risk that any defendant is insolvent is borne by the other defendants who are jointly and severally liable.
 - (3) plaintiff may seek execution on the judgment from any one of multiple defendants held jointly and severally liable
 - ii) although a plaintiff may obtain a judgment of joint and several liability against multiple defendants any may execute on that judgment against any one or several defendants, plaintiff may not recover more than the recoverable damages in total from all defendants
 - iii) even if a plaintiff obtains multiple judgments against different jointly and severally liable defendants for the same indivisible

injury, plaintiff may not recover more than the recoverable damages in total

- e) William L. Prosser recognized in his singular *Handbook of the Law of Torts*, when “there is a joint enterprise, and a mutual agency, so that the act of one is the act of all . . . liability for all that is done must be visited upon each. It follows that there is no logical basis upon which the jury may be permitted to apportion the damages.” William L. Prosser, *Torts* p. 315 (4th ed. 1971).
- f) ***United States v. Arledge***, 553 F.3d 881 (2008), *cert denied*, 129 S.Ct. 2028 (2009)
 - i) defendant argued that a restitution award violated the Eighth Amendment because it was disproportionate to require him to pay the full amount of the calculated loss attributable to the fraud when he received only a very small share of the proceeds from the fraud
 - ii) so long as there is proof that the victim suffered the actual loss that the defendant is ordered to pay, the restitution award is proportional and the **Eighth Amendment** is not violated
 - iii) district court ordered the restitution award to be “joint and several” with eleven other persons who were already convicted of fraud
 - iv) Court held that the defendant may seek contribution from the co-conspirators to pay off the restitution award and reduce the amount he personally owes
 - v) Court specifically found that the district court’s failure to directly order restitution by others who might have participated in the scheme is of no consequence

- g) ***United States v. Crandon***, 173 F.3d 122 (3rd Cir. 1999)
 - i) held that “the statute requires the court to order restitution for the full amount of the victim’s losses. There is nothing in the statute that provides for a proportionality analysis.”
- h) Prosser’s “**single indivisible result**”:
 - i) “Certain results, by their very nature, are obviously incapable of any logical, reasonable, or practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it.”
 - ii) “Such entire liability is imposed both where some of the causes are innocent and where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about a result and also where both were essential to the injury. It is not necessary that the misconduct of two defendants be simultaneous. One defendant may create a situation upon which the other may act later to cause the damage. . . . Liability in such case is not a matter of causation, but of the effect of the intervening agency upon culpability. If a defendant is liable at all, he will be liable for all the damage caused.”

20) **Calculating the Full Amount of Losses**

- a) ***United States v. Johnson***, 132 F.3d 1279, 1286 (9th Cir. 1997)
 - i) a criminal restitution order is reviewed for abuse of discretion and will not be overturned provided that it is within the bounds of the statutory framework

- b) **United States v. Menza**, 137 F.3d 533, 537 (7th Cir. 1998)
 - i) the trial court need only determine the amount of loss by a preponderance of the evidence
- c) U.S.S.G. 6A1.3(a)
 - i) hearsay testimony may be introduced at sentencing hearings to support a claim for restitution so long as the testimony has “sufficient indicia of reliability to support its probable accuracy”
- d) **Masha’s Law Presumption**
 - i) Masha’s Law is a civil remedy separate and apart from criminal restitution
 - ii) **United States v. Estep**, 378 F.Supp.2d 763 n. 4 (E.D.Ky. 2005)
 - (1) “In determining the minimum amount of loss, the Court can consider Congress’ presumption in Masha’s Law [18 U.S.C. 2255] that victims of child pornography ‘shall be deemed to have sustained damages of no less than \$150,000 in value’ from each defendant.”
 - (2) “The Court is not limited by the fact that Masha’s Law is primarily civil in nature. By including it in Section 110, Congress clearly considered Masha’s Law an essential component of the statutory scheme criminalizing child pornography.”
 - iii) **In re: Amy**, 591 F.3d 792, 797 (5th Cir. 2009) (Dennis, J., dissenting)
 - (1) as a “statutory provision[] that could have aided the district court in calculating restitution. Congress, recognizing the difficulty that victims such as petitioner face in showing the amount of their losses, has assigned a conclusive damages

award in civil suits brought under the same Act creating the right to mandatory restitution for this offense.”

e) Link between Criminal Restitution and Civil Torts

i) ***U.S. v. Bach***, 172 F.3d 520 (7th Cir. 1999)

- (1) criminal restitution requires definite persons to be compensated for definite losses just as if the persons were successful tort plaintiffs
- (2) crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts
- (3) functionally, the criminal restitution is a tort statute, though one that casts back to a much earlier era of Anglo-American law, when criminal and tort proceedings were not clearly distinguished
- (4) the Act enables the tort victim to recover his damages in a summary proceeding ancillary to a criminal prosecution
- (5) it is a detail from a defrauder’s standpoint whether he is ordered to make good his victims’ losses in a tort suit or in the sentencing phase of a criminal prosecution”

ii) ***U.S. v. Duncan***, 870 F.2d 1532 (10th Cir. 1989)

- (1) where a civil suit covered the same alleged acts of wrongdoing as the restitution order, and the amount of compensatory damages sought in the civil suit was no greater than the amount alleged by the Government in connection with the criminal offense, there was no abuse of discretion in the district court’s deferral to judgment in the civil suit in determining the proper amount of restitution

iii) ***U.S. v. Rhodes***, 201 F.Supp.2d 906 (C.D.Ill. 2002)

- (1) restitution was not limited to a mail fraud defendant's personal gain; rather, it tracked recovery to which victim would have been entitled in civil suit against the defendant

f) **Per Image Basis**

i) ***In re Hawaiian Airlines, Inc.***, 355 B.R. 225 (D.Ha 2006)

- (1) federal district court ruled that a victim may obtain statutory damages on a per-violation basis, resulting in an award of statutory damages for each violation of the law

21) **Proximate Cause Requirement**

- a) VAWA provisions found at 18 U.S.C. 2259 are broader than any definition of victim in any other federal restitution statute, requiring neither "proximate harm" nor "direct harm," but instead a more generalized "harm."
- b) Congress purposely omitting the term "directly and proximately harmed" in the definition of victim.
- c) Section 2259 only requires a victim to be "harmed as a result of a commission of a crime" in order to receive mandatory restitution.
- d) **Restatement Third of Torts** (2010) – Proximate Cause Defined
 - i) "[T]he term 'proximate cause' is a poor one to describe limits on the scope of liability. It is also an unfortunate term to employ for factual cause or the combination of factual cause and scope of liability. Even if lawyers and judges understand the term, it is confusing for a jury. Courts should craft instructions that inform the jury that, **for liability to be imposed, the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious in the first place.** Employing the term 'proximate

cause' implies that there is but one cause—the cause nearest in time or geography to the plaintiff's harm—and that the factual causation bears on the issue of scope of liability. Neither of these implications is correct. Multiple factual causes always exist . . . and multiple proximate causes are often present. An actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause. And proximate cause is only remotely related to factual causation."

- ii) "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious."
 - iii) an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious. If the harms risked by the tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm
 - iv) the harms suffered by victims—the shame, humiliation, powerlessness and emotional distress—are a direct result of "the hazards that made the defendant's conduct tortious [and criminally illegal] in the first place."
 - v) clearly, any reasonable defendant knows or should know that possessing and/or receiving and/or distributing images of a pre-pubescent girl being raped will result in this kind of "harm occurring with some probability."
- e) ***U.S. v. Monzel***, 2010 WL 4261429 at *9-10 (D.D.C. Oct. 22, 2010)
- i) [p]roximate causation is a "generic label" for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"

- ii) both the state and federal systems uniformly employ the concept of proximate causation as a means to limit the scope of liability
- iii) there is no single approach to proximate causation in either the federal or state courts, with some focusing on the foreseeability of the harm and others asking whether the harm is factually or temporally remote from the defendant's conduct
- iv) many courts have incorporated the "substantial factor" test, which asks whether the defendant's conduct was a **substantial factor** in producing the harm.
- v) in recent years, however, the substantial factor test has fallen into disfavor because its lack of concreteness has caused considerable confusion
- vi) **American Law Institute** ("ALI") very recently adopted a two-pronged approach to causation:
 - (1) whether the actor's conduct was a necessary condition of the harm (**but-for** or **factual cause**) and
 - (2) whether the harm was the product of the risks that made the actor's conduct unlawful (**scope of liability** or proximate cause)
- vii) [i]t is appropriate to rely upon the '**harm within the risk**' approach
 - (1) "[t]he losses alleged by the Government clearly fall within the scope of this risk: all of the victims' alleged losses arise out of the need for ongoing psychological treatment and their inability to maintain normal, emotionally healthy lives as a result of the knowledge that defendant and others continue to possess images of their abuse"

f) **No Proximate Cause Required** - Cases

i) Section 2259 requires the court to award restitution when a defendant commits “any offense under this chapter [110]” to an individual who suffers “harm as a result of a commission of a crime.” There is simply no requirement that a victim suffer a “loss sustained as a result of the offense.”

ii) ***U.S. v. Nathaniel J. Worden***, Case No. 2:09-CR-58-JVB (N.D. Ind. Oct. 26, 2010)

(1) “18 U.S.C. § 2259 unequivocally provides that [a] victim in a child pornography case is entitled to restitution from a defendant for the full amount of his or her losses. Given the lack of jurisprudence on the subject, the Court will not read a proximate cause requirement into the statute, beyond requiring that the Government meet its burden of showing that Amy’s harm was generally foreseeable to users of child pornography like Mr. Worden.”

iii) ***In re: Amy***, 591 F.3d 792, 795 (5th Cir. 2009) (Dennis, J., dissenting)

(1) “Petitioner, as the district court’s findings establish, is entitled to restitution under Section 2259: petitioner has suffered losses attributable, at least in part, to the defendant’s possession of pornographic images. Based on these findings, the statute required the district court to calculate a dollar amount and impose restitution. Her right to restitution is not barred merely because the precise amount she is owed by Paroline is difficult to determine. Congress enacted Section 2259 to provide broad restitution rights for victims who, like petitioner, have been harmed by the commission of child exploitation offenses, including possession of these sexually abusive images. Congress intended to afford child victims ample and generous protection and restitution, not to invite judge-

made limitations patently at odds with the purpose of the legislation. Under the district court's analysis, the intent and purposes of Section 2259 would be impermissibly nullified because the problem of allocating restitution present here will be found in virtually every case where a child depicted in electronically disseminated pornography seeks restitution from those who unlawfully possess those images."

g) **Proximate Cause Required and Established** - cases

i) ***United States v. Brunner***, 2010 WL 148433 at *3 (W.D.N.C. 01-12-10)

(1) "Defendant's conduct was a proximate cause of both Vicky's and Misty's injury. In receiving and possessing the pornographic images of Vicky and Misty taken while they were children, Defendant participated in an ongoing cycle of abuse and thereby contributed to the victims' mental and emotional trauma. That as a general proposition the continued existence and possession of images such as these harm the person depicted is abundantly established by the cases (and the expert testimony incorporated therein) cited in the court's discussion of Misty's and Vicky's status as victims, *supra*. That the criminal behavior of Defendant in this case caused specific harm to Misty and Vicky is also well-documented by the victim impact statements and psychological reports submitted with the Government's motion for restitution."

ii) ***United States v. Hicks***, 2009 WL 4110260 (E.D.V.A. 11-24-09)

(1) there was "ample evidence" that when a criminal defendant sought to receive pornographic images depicting child sex abuse, "his actions presented a sufficiently proximate tie to [the victim's] ongoing injuries to justify an award of restitution under Section 2259."

- (2) "in this Court, like every circuit to consider the causation requirement of Section 2259, a rule of reasonableness is applied."
- iii) ***In re: Amy***, 591 F.3d 792, 795 (5th Cir. 2009) (Dennis, J., dissenting)
- (1) Section 2259 does "not impose[] a requirement of causation approaching mathematical precision."
 - (2) a district court does not abuse its discretion in ordering restitution under Section 2259 so long as its award is a reasonable estimate and is not based on an "arbitrary calculation."
 - (3) the strong congressional intent underlying Section 2259 may justify a relaxation of the usual bar against speculative future losses, depending on the type of loss claimed by the victim of child exploitation crimes.
 - (4) an appellate court should affirm the district court's restitution award "under Section 2259 if the district court is able to estimate, based upon facts in the record, the amount of the victim's loss with some reasonable certainty."
- iv) ***United States v. Hardy***, 707 F. Supp. 2d 597, 606 (W.D. Pa. 2010)
- (1) [t]he language of § 2259 regarding a causal requirement is ambiguous.
 - (2) the phrases 'as a result of' and 'as a proximate result of' are unclear.
 - (3) [i]n the instant case, the legislative history and the related mandatory restitution statutes also strongly support finding that there is a proximate cause requirement.
 - (4) "Given the unanimity of the Circuits that have addressed the question, the language of the statute, and the

legislative history of its amendments, this Court finds that 18 U.S.C. § 2259 does require that a victim's losses be proximately caused by the criminal acts of the defendant for restitution to be awarded."

- (5) "although 'the boundaries of proximate cause are murky' and Amy has suffered a harm caused by innumerable actors, including her uncle who originally abused her and disseminated her images, other criminal defendants who have been found guilty of similar crimes, an unknown number of others who possessed or distributed her images, and Defendant himself, . . . [a]s *Ferber* teaches, the distribution of child pornography does harm the victim depicted in it."
- (6) "the real issue is not whether Defendant has caused Amy harm—he has, because he circulated the images—but whether his doing so is a substantial factor in her overall harm. It is undoubtedly true that harmful images of Amy would be circulating on the internet even if it were not for the conduct of Defendant. But, in this Court's estimation, Amy has shown by a preponderance of the evidence that Defendant's conduct aided in the circulation of said images, that the circulation has harmed her, and that, therefore, Defendant's conduct caused at least part of her overall harm. She has, therefore, shown that Defendant's conduct is a substantial factor in her psychological harm and economic losses."
- (7) "[g]iven *Crandon's* holding that § 2259 does not provide for a proportionality analysis, and applying joint and several liability to any losses that Amy can be shown to have suffered, by a preponderance of the evidence, will best balance between making Amy whole and not subjecting Defendant to greater restitution liability than his criminal activity warrants."

- h) ***In re: Amy Unknown***, 2011 WL 988882 (5th Cir. 2011)
- i) Conclusions:
 - (1) victim has clear and indisputable right to restitution;
 - (2) child was “victim”;
 - (3) Eighth Amendment was not violated by not requiring victim's losses to be proximately caused by defendant's possession of two images depicting victim's sexual abuse; and
 - (4) defendant could seek contribution from other persons who possessed images depicting victim's sexual abuse.
 - ii) question is whether Amy has a “clear and indisputable” right to restitution under mandamus standard?
 - iii) district court denied Amy's request for restitution because the government failed to prove “what losses, if any, were proximately caused by Paroline's possession of Amy's two pornographic images.”
 - iv) district court reasoned that the statute, precedent, and compliance with the Eighth Amendment compel the conclusion that each category of loss in § 2259(b)(3) includes the element of proximate causation, even though the statute confines that requirement to the “catchall” provision, subsection F.
 - (1) this conclusion is clearly and indisputably wrong!
 - (2) the structure and language of § 2259(b)(3) impose a proximate causation requirement only on miscellaneous “other losses” for which a victim seeks restitution.

- v) as a general proposition, it makes sense that Congress would impose an additional restriction on the catchall category of “other losses” that does not apply to the defined categories.
- vi) by construction, Congress knew the kinds of expenses necessary for restitution under subsections A through E; equally definitionally, it could not anticipate what victims would propose under the open-ended subsection F
- vii) under the old generation restitution statute, a victim is “a person directly and proximately harmed as a result of the commission of an offense”
- viii) in contrast, § 2259, enacted 14 years later as part of the MVRA, defines a victim as “the individual harmed as a result of a commission of a crime”
- ix) comparing these statutes reveals that Congress abandoned the proximate causation language that would have reached all categories of harm via the definition of a victim
- x) this change is consistent with the reasons for enacting a second generation of restitution statutes which was to expand, rather than limit, the restitution remedy
- xi) the statute manifests a congressional purpose to award broad restitution
- xii) restricting the “proximate result” language to the catchall category in which it appears does not open the door to limitless restitution
- xiii) the statute itself includes a general causation requirement in its definition of a victim:
 - (1) “For purposes of this section, the term ‘victim’ means the individual harmed as a result of a commission of a crime under this chapter.”

xiv) Given the statute's built-in causation requirement and the volume of causation evidence in the context of child pornography, fears over excessive punishment are misplaced.

- (1) We therefore do not share the district court's concern that rejecting a proximate causation requirement would place § 2259 in danger of offending the Eighth Amendment
- (2) A second reason to doubt that defendant will pay an unconstitutional price for his crime is the possibility that he can seek contribution from other persons who possess Amy's images

xv) Joint and Several Liability

- (1) will enable Paroline to distribute "the full amount of the victim's losses" across other possessors of Amy's images
- (2) also shifts the chore of seeking contribution to the person who perpetrated the harm rather than its innocent recipient

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 110. Sexual Exploitation and Other Abuse of Children (Refs & Annos)

18 U.S.C.A. § 2259

§ 2259. Mandatory restitution

Effective: April 24, 1996

[Currentness](#)

(a) In general.--Notwithstanding [section 3663](#) or [3663A](#), and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and nature of order.--

(1) Directions.--The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement.--An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under [section 3663A](#).

(3) Definition.--For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for--

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.--(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of--

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.--For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased,

the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

Credits

(Added [Pub.L. 103-322, Title IV, § 40113\(b\)\(1\)](#), Sept. 13, 1994, 108 Stat. 1907, and amended [Pub.L. 104-132, Title II, § 205\(c\)](#), Apr. 24, 1996, 110 Stat. 1231.)

[Notes of Decisions \(31\)](#)

Current through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, and 111-350) approved 2-25-11

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